Filed 2/19/16 Nielsen v. Reed CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HENRIK NIELSEN, Plaintiff and Respondent, v. GERALD REED et al., Defendants and Appellants.	H039647 (Monterey County Super. Ct. No. M92778)

In this appeal we consider the trial court's authority to replace a 2009 default decree in an action for judicial foreclosure with a new decree in 2012. The 2012 decree was intended to change two parts of the original 2009 decree. First, it eliminated an award of postjudgment interest at 14 percent, a rate higher than the 10 percent authorized by Code of Civil Procedure, section 685.010, subdivision (a).[1] Second, it added an express determination about the availability of a deficiency judgment as required by section 726 (providing here for no deficiency judgment). The trial court's authority to make this second change is the primary issue on appeal.

The unavailability of a potential deficiency judgment after a foreclosure sale has consequences not only for a judgment creditor, but it also eliminates the right of a

[1] Unspecified statutory references are to the Code of Civil Procedure.

judgment debtor to redeem the property at a foreclosure sale. In this case it is the judgment debtors who challenge the elimination of a potential deficiency judgment and any corresponding right of redemption.

Appellant debtors challenge the trial court's authority to enter a new decree of foreclosure more than three years after the original decree. They also contend that the respondent creditor's election of remedies bars a modification that precludes a deficiency judgment. Respondent creditor argues that both errors in the original decree were clerical and therefore correctable at any time, and that the 2012 decree properly modified the 2009 decree. He also contends that the debtors cannot appeal from the order denying their motion to vacate the 2012 decree.

We are unable to conclude that the errors in the 2009 decree were clerical. We will find, however, that the illegal rate of postjudgment interest was void and not requested in the complaint, and was therefore subject to correction at any time. In contrast, we will find that the trial court was unauthorized in 2012 to attempt to modify the 2009 decree to address the availability of a deficiency judgment. We will therefore reverse the order denying the debtors' motion to vacate as void the 2012 decree.

I. TRIAL COURT PROCEEDINGS

On August 7, 2008, plaintiff Henrik Nielsen (Creditor) filed a complaint seeking judicial foreclosure on a deed of trust dated May 9, 2007 securing a promissory note from defendants Gerald N. Reed and Beatrice J. Reed (Debtors) in the principal amount of $292,500 with realty in San Miguel, California. In the note, Debtors promised to make monthly payments of $3,412.50 beginning on July 1, 2007, at 14 percent annual interest, with the full balance due on June 1, 2008. A contemporaneous addendum to the note provided that the monthly payments would be interest only for the first 11 months. The note also provided that Debtors would be in default if they did not make timely monthly payments of the amount due, and Creditor could accelerate the full amount of the unpaid principal after providing Debtors with written notice to cure the default by a certain date.

The trust deed mirrored those provisions of the note and authorized Creditor to sell the property on Debtors' default.

The complaint alleged that Debtors had not made the payment due on June 1, 2008, and that Creditor had notified them of their default and his election to accelerate the amount due. The complaint requested judicial foreclosure of the deed of trust, with application of the proceeds of the sale as provided by law against the principal sum of $292,500.00, plus late fees of $341.25, plus reasonable attorney fees and costs of suit, as provided in the deed of trust. Included in the prayer of the complaint were requests to: order a sale of the property, with application of the proceeds to the amounts due Creditor, and that Debtors' "equity of redemption in the property" be barred "when the time for redemption has elapsed"; award Creditor interest at the rate of 14 percent annually from June 1, 2008 "to the date of entry of judgment"; "award Plaintiff judgment and execution … for any deficiency that may remain after applying all proceeds of the foreclosure sale which are applicable to the satisfaction of the amounts found due by the court …"; and have "the levying officer, after the time for redemption has elapsed, execute a deed to the purchaser at the foreclosure sale … ."

A. 2009 DECREE OF FORECLOSURE

On January 5, 2009, due to Debtors' failure to appear, the clerk entered their default as Creditor requested. Creditor also requested the court to enter a default judgment for a total amount of $310,593.75, including the unpaid principal, daily interest at $113.75, late fees, costs, and attorney fees. A box on the form was checked stating that testimony was required.

Creditor filed a declaration that essentially confirmed the allegations of the complaint. He also appeared and testified at a prove-up hearing on March 11, 2009. The court granted judgment that day awarding Creditor unpaid principal of $292,500.00, prejudgment interest of $32,191.25 at an annual rate of 14 percent, attorney's fees of $2,730.00, costs of $851.00, and late fees of $2,730.00, for a total of $331,002.25. Based

on Creditor's declaration and testimony, the court signed a form default judgment prepared by Creditor's counsel, ordering the property sold to satisfy the judgment. The judgment of foreclosure attached to default judgment provided that any surplus would be paid to Debtors. The judgment further provided that Debtors' "equity of redemption in the property" would be barred after the delivery of the deed to the purchaser at the sale "when time for redemption has elapsed."

Significantly, the default decree did not state what would occur if the proceeds of the sale were less than $331,002.25. The default decree also did not expressly identify either Debtor as personally liable for a deficiency judgment nor state that Creditor had waived a deficiency judgment.

B. FORECLOSURE SALE PROCEEDINGS

A writ of sale was issued in March 2009. The Monterey County Sheriff recorded a notice of levy, but the levy terminated unsatisfied after Debtors filed for bankruptcy in November 2009. In March 2010, Debtors were discharged from bankruptcy.

In March 2011, another writ of sale was issued, directing sale of the property for $331,027.25, with $90.41 daily interest accruing. In May 2011, the sheriff recorded another notice of levy. On November 8 of that year, the sheriff scheduled a sale of the property for November 30. On November 28, Debtors applied ex parte for a restraining order and filed a motion to quash or vacate the levy and writ of sale. On November 29, the court issued an ex parte order temporarily restraining the sale pending a hearing set for January 13, 2012. (That hearing was apparently dropped from the calendar.)

In February 2012, a sheriff's sale was scheduled for March 6, 2012. The notice stated in part, "The property to be sold is subject to the right of redemption." On February 22, 2012, Debtors applied again for a restraining order and moved to quash the writ of sale. They pointed out that different statutes apply to the sale depending on whether a deficiency judgment is available.

At a hearing on February 29, Creditor stated, "we lent them money to buy the place so they could build their dream home and retire … ." Debtors acknowledged their plan to retire on the property, though it remained bare land with no residence. Debtors asserted that Creditor had refused their offer of a deed in lieu of foreclosure, and speculated that he did so in order to obtain a deficiency judgment, which "he couldn't have gotten … because his judgment doesn't provide for it." Creditor estimated the property was worth about $200,000 at the time of the hearing.

The court stated: "I did, in reviewing the file, see what I perceived to be an error in the judgment which could be rectified, which as it says, 14 percent per annum from the date of the judgment. … [I]t was actually 14 percent prior to – prejudgment interest, not post judgment. [¶]...[¶] [A]t best, it's a matter of a technical curing of the judgment which could be done on motion and cleared up in less than say 45 days, and it would specify it's not to be a deficiency judgment, and the sale would be conducted accordingly, and then it's done and you don't have the property. I'm wondering what the point is in trying to postpone it since there is no home on it, you're not living on the property, and if the judgment needs to be corrected, it's a fairly simple matter to do so."

Creditor asserted that Debtors would have a year to redeem after the sheriff's sale, but the court questioned if that was true on a nondeficiency. The court enjoined the sale until the next hearing on April 20, 2012, provided that Debtors deposited $500 with the clerk of the court.

Debtors filed two supplements to their motion to quash the sheriff's sale and Creditor filed opposition, in which he acknowledged that any personal liability of Debtors was voided by their bankruptcy and that section 685.010 limited the legal rate of postjudgment interest.

At the hearing on April 20 the court granted Debtors' motion to quash the sale and vacate the levy without prejudice. In its written order filed May 10, the court stated that "[t]he Judgment dated March 11, 2009 is defective as it requires Post-Judgment interest

at the rate of 14% and fails to state whether or not it is a deficiency judgment." "[T]he Judgment is defective and needs to be clear and accurate in order for Plaintiff to proceed with a valid Writ of Sale and Levy."

C. 2012 DECREE OF FORECLOSURE

On July 2, 2012, Creditor applied to modify the March 2009 default judgment to reduce the interest rate and exclude a deficiency judgment The application stated that the 2009 default decree "allowed for a deficiency judgment if the proceeds of the sale did not satisfy the judgment," and that Debtors' chapter 7 bankruptcy had discharged the money portion of the judgment owed creditor. Debtors opposed the application in writing.[2]

On July 31, 2012, without a hearing, the court signed and filed a "non-deficiency court default judgment" that ordered judgment for $331,002.25 in favor of Creditor and ordered the property sold, just as in the 2009 decree. The new decree also provided, "[t]here shall be no judgment for deficiency." This second decree awarded prejudgment

[2] The original default decree of foreclosure, which did not provide for a deficiency judgment, had preceded Debtors' bankruptcy filing by about eight months. In later filings in the trial court, Debtors repeatedly asserted that Creditor did not seek relief from the bankruptcy stay and did not file a claim in the bankruptcy. After Debtors' discharge in bankruptcy, Creditor took the position that the discharge eliminated Debtors' personal liability for the secured debt. The bankruptcy court docket submitted by Debtors does not show which debts were listed or scheduled, which creditors were notified of their bankruptcy, what notice was given to Creditor, what assets were abandoned by the bankruptcy trustee, or what claims were scheduled to be discharged without payment. In view of the lack of documentation, we make no assumptions about the effect of the bankruptcy discharge on the availability of a deficiency judgment, and none is necessary to reach our conclusions. It is true that a Chapter 7 bankruptcy discharge will extinguish a debtor's personal liability on a scheduled mortgage, though the creditor retains the right to foreclose on the property. (*Johnson v. Home State Bank* (1991) 501 U.S. 78, 82–83.) But we note that bankruptcy does not discharge debts that are neither listed nor scheduled by the debtor unless the creditor has notice or actual knowledge of the bankruptcy case in time to make a claim. (11 U.S.C.A. § 523, subd. (a)(3).)

interest at the rate of 14 percent, but did not provide for postjudgment interest or payment of any surplus to Debtors, and it included no findings about Creditor's possible waiver of a deficiency judgment.

On September 14, 2012, Debtors moved "to revoke, recall, or declare as unenforceable" the 2012 decree. They requested reconsideration under section 1008, subdivisions (b) and (e). The motion was denied after a hearing on October 19, 2012.

On December 7, 2012, Debtors moved to vacate the order modifying the judgment, arguing that the 2012 decree was void because the court had no jurisdiction to enter it. Creditor filed no opposition, but did appear for the hearing on January 18, 2013. On April 5, 2013, the court denied the motion to vacate. The written ruling explained that the court had "treated the motion filed by Defendant[s] in April 2012[] as a Motion for New Trial and/or Motion to Vacate the Default Judgment, and having granted the motion and obtaining jurisdiction, modified the default judgment. Defendants were in default and could not participate."

II. DISCUSSION

A court's final judgment can be vacated, modified, or corrected only in limited circumstances. "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." (§ 473, subd. (d).) The 2012 default decree of foreclosure sought to correct two perceived defects in the 2009 default decree of foreclosure by (1) adding a provision that Creditor was not entitled to a deficiency judgment against Debtors and (2) deleting the provision for postjudgment interest at 14 percent. Debtors challenge the added provision. The parties' main disagreement is about whether the absence of an express deficiency judgment finding was a judicial error or a correctable clerical error.

A. STATUTORY FRAMEWORK FOR JUDICIAL FORECLOSURE

A judicial foreclosure action will often result in two separate judgments, first a decree of foreclosure that determines the amount of the debt and the availability of a deficiency judgment and orders a sale of the property, and second, an award of a deficiency judgment after the foreclosure sale.

1. Determination of Amounts Due, Order for Sale, and Availability of a Deficiency Judgment

Section 726 both authorizes an action for judicial foreclosure and describes the procedure involved. The statute (as it did at the time of the May 2007 secured transaction) describes several components of a decree for the foreclosure of a mortgage or deed of trust, including the amount due plaintiff and, where the mortgage provides for the payment of attorney's fees, the amount of fees "as the court shall find reasonable, not exceeding the amount named in the mortgage." (§ 726, subd. (a).) The decree must also "direct the sale of the encumbered real property … and the application of the proceeds of the sale to payment" of the amount due the plaintiff, court costs, and the expenses of the levy and sale. (*Ibid.*)

"A judgment of foreclosure must either state that there shall be no judgment for a deficiency or name the defendants against whom a deficiency judgment may be ordered." (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 883, fn. 7.) More specifically, section 726, subdivision (b) provides that a foreclosure decree shall declare whether a deficiency judgment is prohibited by section 580b or whether the judgment creditor has waived a deficiency judgment. Alternatively, if a deficiency judgment is available, the decree must identify which defendants are personally liable for a deficiency judgment.

The availability of a deficiency judgment in a judicial foreclosure proceeding is one distinguishing feature from a nonjudicial foreclosure.[3] Section 580d, enacted in 1939, provides that no deficiency judgment is available after a nonjudicial foreclosure. (*Roseleaf Corp., supra,* 59 Cal.2d at pp. 43–44.)

However, under section 726, subdivision (b), a deficiency judgment may also be prohibited in a judicial foreclosure action by section 580b, which exempts from deficiency judgment a deed of trust or mortgage securing a loan used to purchase or construct a dwelling to be occupied by the borrower. (*Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 439–442.) This purchase money exemption has been explained as "a stabilizing factor in land sales," preventing a seller from overvaluing property at the risk of having an inadequate security and protecting defaulting purchasers against personal liability when property values are depressed. (*Roseleaf Corp, supra*, at p. 42; *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 663–664 (*Lim*).

The applicability of section 580b has been regarded as an affirmative defense that may be forfeited if not raised in an answer (see *Palm v. Schilling* (1988)

---

[3] *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226 (*Alliance Mortgage*) explained at page 1236: "In a judicial foreclosure, if the property is sold for less than the amount of the outstanding indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. (*Roseleaf Corp v. Chierighino* (1963) 59 Cal.2d 35, 43–44 (*Roseleaf Corp.*).) However, the debtor has a statutory right of redemption, or an opportunity to regain ownership of the property by paying the foreclosure sale price, for a period of time after foreclosure. [Citation.] [¶] In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust. [Citation.] Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption. [Citation.] However, the creditor may not seek a deficiency judgment."

199 Cal.App.3d 63, 67, fn. 3), although its protection may not be waived at the time the purchase money loan is made. (*Id.* at pp. 65, 76; *Lim*, *supra*, at pp. 668–669.)

2. Conditional Right of Redemption

Once a decree of foreclosure issues, the statute provides for two types of foreclosure sales. If a deficiency judgment is waived or prohibited, section 716.020 provides that a writ of sale is to be executed by levying upon the property, providing notice of the sale, selling it, and applying the proceeds as directed by the judgment for sale. If a deficiency judgment is not waived or prohibited, the property will be sold subject to a right of redemption. When there is a right to redeem, section 729.050 requires the levying officer who conducts the sale to notify the judgment debtor of the right of redemption.

The debtor's possible right of redemption is another difference between nonjudicial foreclosures and judicial foreclosures. At the heart of this case is the provision in the statute that the right to redeem is conditional. It exists only when a foreclosure decree has established the availability of a deficiency judgment. (§ 729.010, subd. (a).) By negative implication, there is no right of redemption when the foreclosure decree does not provide for a deficiency judgment. In other words, the debtor's right of redemption is dependent on the availability of a deficiency judgment to the creditor.[4] While section 726 does not expressly require the court to declare whether the judgment

[4] We are aware that *Life Savings Bank v. Wilhelm* (2000) 84 Cal.App.4th 174 stated, "The debtor's right to redeem is a right related to the foreclosure sale and is entirely separate from the creditor's right to obtain a deficiency judgment." (*Id.* at p. 179.) This statement arose in the context of determining whether the three-month time after a foreclosure sale to apply for a deficiency judgment under section 726, subdivision (b) was a statute of limitation. It does not undermine our observation that the right of redemption attaches in a given case only if the court finds a deficiency judgment is available.

debtor has a right of redemption, the right's existence is effectively determined by the availability of a deficiency judgment. Entry of a decree of foreclosure, even a decree declaring judgment debtors personally liable for a deficiency judgment, does not necessarily result in a deficiency judgment being entered. If the proceeds of the foreclosure sale exceed the amount of the secured indebtedness determined in the foreclosure decree, there is no need for further proceedings to determine a deficiency. The statutes thus provide for the later entry of a deficiency judgment if appropriate after the foreclosure sale.

B. APPEABILITY

Although a foreclosure decree is only the first step in a judicial foreclosure action, it results in an appealable judgment. (*United California Bank v. Tijerina* (1972) 25 Cal.App.3d 963, 969.) Any related deficiency judgment is also separately appealable. "In a sense, the judgment of foreclosure is interlocutory, and the deficiency judgment is final" and separately appealable. (*Ewing v. Richvale Land Co.* (1917) 176 Cal. 152, 155 [discussing earlier version of section 726]; cf. *Kinsmith Financial Corp. v. Gilroy* (2003) 105 Cal.App.4th 447, 454.)

This appeal is not from the 2009 default decree of foreclosure. The time to appeal from that order has long expired. Nor is this appeal from the modified default decree of foreclosure entered in 2012. Instead, it is from an April 2013 ruling denying Debtors' motion to vacate the 2012 decree.

Creditor asserts Debtors are unable to attack the 2012 decree by appealing from the denial of a motion to vacate that decree because the decree is valid. As this court explained in *Malatka v. Helm* (2010) 188 Cal.App.4th 1074: "It is established that an order denying a motion to vacate a judgment is deemed appealable only to the extent it raises new issues unavailable on appeal from the judgment. This restriction is imposed to prevent both circumvention of time limits for appealing and duplicative appeals from essentially the same ruling. [Citations.]" (*Id.* at p. 1082.)

"[A]n exception to this general rule applies when the underlying judgment is void. In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment." (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691.) In other words, a contention that a judgment is void may be raised either directly on appeal from that judgment or on appeal from a later denial of a motion to vacate that judgment. Debtors invoke this exception, so we must determine whether the 2012 decree of foreclosure is wholly or partly void.

C. VALIDITY OF THE 2009 DECREE OF FORECLOSURE

It is too late to appeal from the 2009 decree of foreclosure. However, the 2012 decree modified the 2009 decree in two respects based on perceived defects in the original decree. Judicial authority to modify the decree depends on the existence of modifiable errors. We must therefore consider the validity of the 2009 decree to determine whether the 2012 decree is valid.

The trial court found two errors in the 2009 decree. A written order in May 2012 stated, "[t]he Judgment dated March 11, 2009 is defective as it requires Post-Judgment interest at the rate of 14% and fails to state whether or not it is a deficiency judgment." A later written ruling filed in April 2013 explained that the court had "treated the motion filed by Defendant[s] in April 2012[] as a Motion for New Trial and/or Motion to Vacate the Default Judgment, and having granted the motion and obtaining jurisdiction, modified the default judgment."

A court can grant a motion for a new trial within 60 days after the moving party has been served with notice of entry of default judgment. (§ 660.) Section 473 authorizes a court to grant a party relief from a default judgment or order "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect," upon an application "made within a reasonable time, in no case exceeding six months," after the judgment or order was taken. (§ 473, subd. (b).) Debtors correctly point out that there was no timely motion for a new trial after the 2009 foreclosure decree nor a motion

to vacate or modify the decree under section 473 based on Creditor's or Debtors' mistake, inadvertence, surprise, or excusable neglect. Their February 2012 motion to quash pointed out errors in the 2009 decree, but did not request its correction. If the court was authorized in 2012 to modify or correct its own 2009 judgment, it had to be on other grounds.

1. Alleged Clerical Errors

On appeal Creditor contends that both errors in the original decree were clerical and therefore correctable, while Debtors dispute these claims.

Section 473 provides, "The court may, upon motion of the injured party, or on its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed … ." (§ 473, subd. (d).) This section codifies what has been recognized as a trial court's inherent authority to correct an order or judgment by a nunc pro tunc order at any time. (*Estate of Goldberg* (1938) 10 Cal.2d 709, 717.)

An appellate court will defer to a trial court's determination that an error was clerical rather than judicial when that determination is supported by substantial evidence either on the face of the judgment or extrinsic to the judgment. (Cf. *Bastajian v. Brown* (1941) 19 Cal.2d 209, 214–215 [declaration stated trial judge's intent].) However, when there is no conflicting extrinsic evidence about the nature of the error, as here, a question of law is presented which a reviewing court may determine independently. (*Estate of Burnett* (1938) 11 Cal.2d 259, 262–263; *Morgan v. State Bd. of Equalization* (1949) 89 Cal.App.2d 674, 682.)

The court's authority extends to correcting clerical errors that cause its order or judgment not to reflect what the court actually decided, but does not extend to correcting judicial errors in judgment. (*Carpenter v. Pacific Mut. Life Ins. Co.* (1939) 14 Cal.2d 704, 707–708; *Olivera v. Grace* (1942) 19 Cal.2d 570, 574; *Estate* of *Eckstrom* (1960) 54 Cal.2d 540, 544; *Don v. Cruz* (1982) 131 Cal.App.3d 695, 703.) "The

distinction between a clerical error and a judicial error does not depend so much on the person making it as it does on whether it was the deliberate result of judicial reasoning and determination." (*Estate of Doane* (1964) 62 Cal.2d 68, 71.) A judge's signature on an order or judgment prepared by a party's attorney to reflect the court's ruling does not make every drafting mistake a judicial error. (*Estate of Goldberg, supra,* at p. 715; *Zisk v. City of Roseville* (1976) 56 Cal.App.3d 41, 47.)

To correct clerical errors in an existing order or judgment, clarifying words may added (*Bufalini v. De Michelis* (1955) 136 Cal.App.2d 458, 460; *Ames v. Paley* (2001) 89 Cal.App.4th 668, 674) and extraneous words may be removed (*Estate of Careaga* (1964) 61 Cal.2d 471, 474–475, 478), but the changes cannot "make the judgment express anything not embraced in the court's decision, *even though the proposed amendment contains matters which ought to have been so pronounced*." (*Felton Chemical Co. v. Superior Court* (1939) 33 Cal.App.2d 622, 627; our emphasis.) Clerical error has been found when a foreclosure decree did not name each defendant as personally liable whom the court intended to name. (*Citizens National Trust & Savings Bank of Los Angeles v. Holton* (1930) 210 Cal. 44, 46–47; *Edwards v. Lang* (1961) 198 Cal.App.2d 5, 15–16; *Lang v. Superior Court* (1961) 198 Cal.App.2d 16, 18.)

a. Postjudgment Interest Rate

The original complaint prayed for an award of interest at the contract rate of 14 percent annually from the alleged nonpayment on June 1, 2008 "to the date of entry of judgment." The 2009 foreclosure decree awarded both prejudgment interest of $32,191.25 at the rate of 14 percent and also "interest at the annual rate of 14% from the date of this judgment." The latter provision was contained in the attachment to the form judgment. The minute order mentioned the prejudgment interest rate award and also the provisions of the attachment.

Creditor argues that the difference between the 14 percent rate ordered and the allowable legal rate of 10 percent is the result of typing the wrong number in one

sentence. We recognize that an apparent typographical error may be a clerical error that is subject to correction at any time. (*Doxsee Co. v. All Persons* (1935) 3 Cal.2d 609, 614.) However, this explanation does not fit the facts here. Creditor presented no declaration or other evidence in his application to modify the 2009 foreclosure decree that the request for 14 percent postjudgment interest resulted from counsel's mistake or inadvertence in drafting the proposed decree. It is significant that 14 percent was not a random number; it was the contractual rate of interest and it was awarded elsewhere in the default judgment as the rate of prejudgment interest.

Creditor also argues it is clear from the clerk's minutes that the court intended to award 14 percent in prejudgment, but not postjudgment, interest. He perceives from the minutes that the court was purposefully silent about postjudgment interest. We read the minute order differently. The clerk's minutes reflect a judgment for individual amounts due in the exact order and amount listed in the completed default judgment form and also an order for a foreclosure sale as described in the attachment. The attachment included the provision for 14 percent postjudgment interest. Based on the clerk's minutes, we are unable to distinguish judicial deliberation involved in ordering 14 percent interest prejudgment versus postjudgment. The record on appeal does not contain a reporter's transcript of the prove-up hearing.

Creditor invites us to defer to various characterizations of the 2009 decree made by the trial court in 2012, but we see no finding that the error was clerical from the judge who found an error in the 2009 decree in February 2012, nor the judge who found the decree defective in April 2012 and who signed the second decree in July 2012, nor the judge who signed the original decree in 2009. We are unable to conclude on the existing record that the postjudgment interest rate of 14 percent was merely a clerical error rather than reflecting the decision intended by the trial court.

b. Omitted Reference to Deficiency Judgment

Section 726, subdivision (b) requires that a trial court "determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and [ ] name the defendants against whom a deficiency judgment may be ordered" unless a deficiency judgment is waived by a creditor or prohibited by section 580b.

Creditor's original complaint prayed that the court award judgment and execution against Debtors "for any deficiency that may remain after applying all proceeds of the foreclosure sale which are applicable to the satisfaction of the amounts found due by the court …" Though the same attorney apparently drafted Creditor's 2008 complaint and the 2009 decree, the decree included no express determination about the applicability of section 580b or whether Creditor had waived a deficiency judgment and it did not determine the personal liability of either Debtor for a deficiency judgment.

As we have noted, the section 580b exemption is an affirmative defense that may be forfeited if not raised in an answer. In this case Debtors defaulted without filing an answer, thereby forfeiting this protection.

The law is not as clear about whether a creditor's waiver of deficiency judgment is also an affirmative defense subject to forfeiture. In *Gerson v. Kelsey* (1935) 4 Cal.App.2d 158, the defendant debtor raised as an affirmative defense that the creditor had orally waived a deficiency judgment, but that opinion did not discuss who bears the burden of proof of the alleged waiver. (*Id.* at p. 159.) Another early opinion characterized a creditor as waiving a deficiency judgment by not requesting one in his complaint. (*Montgomery v. Merrill* (1882) 62 Cal. 385, 392–393.) The law remains is unsettled about how this issue should be raised.

We have requested and obtained supplemental briefing about whether it necessarily amounted to a waiver when Creditor, after praying for a deficiency judgment, submitted a proposed foreclosure decree that did not name any defendant as personally liable for a deficiency judgment. Debtors contend that a finding of waiver must be

predicated on a declaration affirmatively waiving the right to a deficiency judgment. Creditor contends that there must be evidence of a knowledgeable waiver. As the complaint alleged no issue of waiver and the decree made no express finding about waiver, we are unable to conclude that the court made any implicit finding about whether Creditor intentionally waived his right to a deficiency judgment by submitting the default decree as proposed.

On these facts, we are also unable to conclude that the court's omission of any express finding regarding Creditor's waiver of a deficiency judgment or Debtors' personal liability for a deficiency judgment was merely clerical. Creditor argues, "In this regard, the judgment is simply uncertain and in need of clarification." He also argues that silence was not an option since the law requires determinations to be made, so that any resulting uncertainty "necessarily arises from poor draftsmanship and not from any '*exercise of judgment, judicial reasoning, or determination.*' " Creditor also notes that "[p]oor drafting happens, and it also happens that proposed but erroneous or poorly drafted decrees are not always properly read or meaningfully considered before being signed by the court." Debtors assert it was a judicial rather than clerical error to omit from the original foreclosure decree any determination about a deficiency judgment. They assert as a consequence the trial court lost jurisdiction to correct those errors after six months.

Unlike the rate of postjudgment interest, Creditor does not contend that the absence of a finding about a deficiency judgment was a mere typographical error. He suggests that the 2009 decree does not reflect the court's actual decision on this issue, but we find little support for this in the record. A reporter's transcript of the March 2009 default prove-up hearing has not been included in the record on appeal. When Creditor applied to modify the 2009 decree, he supplied no declaration establishing that his former counsel had simply forgotten about the complaint's prayer for a deficiency judgment or inadvertently omitted a sentence determining the availability of a deficiency judgment. It

was not a situation where counsel's draft decree failed to capture the court's oral ruling, as the decree was obviously prepared for the judge's signature in advance of the prove-up hearing. There is no indication in the record that the court specifically intended to make any ruling on the issue of the availability of a deficiency judgment.

2. Facial Voidness

Whether an order or judgment is void on its face is generally a question of law subject to independent review on appeal. (*People v. Davis* (1904) 143 Cal. 673, 676 (*Davis*) [eight years later, court vacated default judgment annulling a certificate of purchase].); *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.) As it is a jurisdictional question, the issue may be raised for the first time on appeal. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417 (*Bernstein*).)

We have invited and obtained supplemental briefing on whether the 2009 decree was subject to correction based on being void or partly void on its face. "It is well settled in this state that a court has no power to set aside on motion a judgment or order not void on its face unless the motion is made within a reasonable time, and it has been definitely determined that such time will not extend beyond the limited time fixed by section 473 of the Code of Civil Procedure as at present in force." (*Thompson v. Cook* (1942) 20 Cal.2d 564, 569; cf. *Davis*, *supra*, at p. 675.) An untimely modification of a default judgment, "which is not invalid on its face, is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate [or modify] it is beyond the jurisdiction of the court, and therefore void." (*Ibid.*; *Solot v. Linch* (1956) 46 Cal.2d 99, 105–106 ["since respondent's motion for relief was made after the prescribed period had expired, the court was without jurisdiction to act and the order setting aside his default and the judgment thereon was void."]; cf. *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1238 ["The trial court had no jurisdiction to so amend the judgment, and the resulting amended judgment is thus void and of no effect."].)

The same legislation that provided for clerical error correction in section 473 also added that "[t]he court … may, on motion of either party after notice to the other party, set aside any void judgment or order." (§ 473, subd. (d); *Bernstein, supra,* at p. 414.) "Long prior to this amendment it was well established that the superior court has jurisdiction at any time to set aside a judgment or order void on its face." (*Estate of Estrem* (1940) 16 Cal.2d 563, 571.)

Not every judicial error renders a judgment void on its face. In discussing the premature entry of summary judgment ordering forfeiture of a bail bond, *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653 explained that though acting contrary to statutory authority exceeds a court's jurisdiction, the resulting judgment is usually voidable, but not void, and "generally not subject to collateral attack once the judgment is final … ." (*Id.* at pp. 660–661; cf. *Wells Fargo & Co. v. City and County of San Francisco* (1944) 25 Cal.2d 37, 40 (*Wells Fargo*) ["A mere erroneous decision on a question of law, even though the error appears on the face of the record, does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant."].) This court has said that a judgment is void on its face if "it granted relief which the court under no circumstances had the power to grant in the exercise of its subject matter jurisdiction." (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 22.)

A default judgment cannot exceed either the type or amount of relief sought by the complaint. (§ 580, subd. (a); *Becker v. S.P.V. Construction Co*. (1980) 27 Cal.3d 489, 493–494 (*Becker*).) "[A] defendant must be notified by the prayer [citation] or allegations in the body of the complaint of the damages sought." (*Bernstein, supra,* 168 Cal.App.3d at pp. 417–418.) " It is fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the complaint served upon him. The logic underlying this principle is simple: a defendant who has been served with a lawsuit has the right, in view of the

relief which the complainant is seeking from him, to decide not to appear and defend. However, a defendant is not in a position to make such a decision if he or she has not been given full notice." (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.)

It is established that a default judgment awarding greater relief than requested in the complaint is void for exceeding the court's jurisdiction under section 580. (*Burtnett v. King* (1949) 33 Cal.2d 805, 808 [dissolution complaint did not request resulting division of community property]; *Becker, supra*, 27 Cal.3d at p. 495 [complaint for damages in excess of $20,000 did not authorize default award of more than $20,000, and prayer did not request attorney fees that were awarded]; *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 [request for damages exceeding the court's minimum jurisdictional limits authorized award of $15,000 in compensatory damages]; *In re Marriage of Lippel, supra*, 51 Cal.3d at pp. 1163, 1167 [dissolution petition did not request child support later awarded].)

a. Postjudgment Interest Rate

Nothing in section 726 requires a foreclosure decree to determine the rate of postjudgment interest. "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation." (Civ. Code, § 3289, subd. (a).) "Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." (§ 685.010, subd. (a).) A "[m]oney judgment" is "that part of a judgment that requires the payment of money." (§ 680.270.) "The amount required to satisfy a money judgment is the total amount of the judgment as entered … with the following additions and subtractions: [¶] … [¶] (b) The addition of interest added to the judgment as it accrues pursuant to Sections 685.010 to 685.030, inclusive. …" (§ 695.210.)

Postjudgment interest on a money judgment accrues by operation of law, even if the judgment does not provide for it. (*Glenn v. Rice* (1917) 174 Cal. 269, 276; *Housing Authority v. Arechiga* (1962) 203 Cal.App.2d 159, 161; cf. *Koszdin v. State Comp. Ins.*

Fund (2010) 186 Cal.App.4th 480, 491.) While the 2009 decree was not required to specify any amount or rate of postjudgment interest, if it provided for such interest, it should have specified the legal rate. (*Taylor v. Ellenberger* (1901) 134 Cal. 31, 32.)

Earlier cases held that an erroneous award of excess interest did not make a default judgment void. (E.g., *Bond v. Pacheco* (1866) 30 Cal. 530, 536 [clerk's default judgment included larger amount of interest than requested in prayer of complaint]; *Wells Fargo, supra*, 25 Cal.2d 37, 44 ["In allowing interest from the earlier date, the court erred therefore merely as to the scope of plaintiff's recovery and its judgment is therefore not subject to collateral attack."].) However, those cases did not involve the award of an illegal interest rate.

We conclude the award of an illegal postjudgment interest rate in the 2009 foreclosure decree was void on its face. In supplemental briefing, the parties agree with this conclusion. We find support in *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009 (*311 South Spring Street Co.*), a case that did not involve a default judgment. Instead, a judgment after trial was entered against the State of California that provided for postjudgment interest of 10 percent, even though the California Constitution provides for seven percent postjudgment interest against governmental entities. (*Id.* at p. 1012.) The State did not question the award on appeal, but first challenged it collaterally by refusing to pay interest above seven percent. (*Id.* at pp. 1012–1013.) The appellate court concluded "that the provision awarding interest in excess of 7 percent is void and is the type of defect which can be collaterally attacked at any time." (*Id.* at p. 1015.) "[B]ecause article XV, section 1 of the California Constitution declares the rate of postjudgment interest to which plaintiff is entitled, the award of a rate of interest in excess of 7 percent constitutes a grant of relief which the Constitution forbids and the court had no power to grant. … [W]e define a judgment that is void for excess of jurisdiction to include a judgment that grants relief which the law declares shall not be granted. Accordingly, we determine that the portion of the

instant judgment awarding postjudgment interest in excess of 7 percent is void." (*Id.* at p. 1018.) The court distinguished *Wells Fargo*, *supra*, 25 Cal.2d 37, as involving merely an incorrect date for calculating interest, rather than an illegal rate. (*311 South Spring Street Co.*, at p. 1018.)

Here, the 2009 decree awarded postjudgment interest of 14 percent annually, even though the original complaint only requested 14 percent interest until entry of judgment. In response to our request for supplemental briefing, the parties have acknowledged that the original complaint did not request a postjudgment interest award of 14 percent.

We conclude that the award of postjudgment interest at the illegal rate of 14 percent was void on its face for disregard of section 685.010 as well as for exceeding the prayer of the complaint. Accordingly, that part of the 2009 decree is subject to correction at any time.

b. Omitted Reference to Deficiency Judgment

Debtors argue that "the trial court acted without jurisdiction when it modified the Default Judgment and awarded relief that was inconsistent with that sought by the Complaint and pursued to the Default Judgment" and that the 2012 modification provided Creditor "with a *completely opposite remedy* than that sought in the Complaint … ." as Creditor was denied the deficiency judgment his complaint requested. "[T]he modification was in excess of the damages prayed for in the complaint" by eliminating Debtors' right of redemption. Creditor contends that Debtors have forfeited this argument, but facial voidness is not an objection that can be forfeited. In supplemental briefing, Creditor further contends that "[t]he express terms of the first decree, if anything, awarded lesser relief than sought in plaintiff's complaint and represented the best possible result for the defendants … ."

Scamman v. Bonslett (1897) 118 Cal. 93 (*Scamman*) illustrates the application of these principles to a judicial foreclosure action. The plaintiff creditor's action did not request a deficiency judgment against the mortgagor. (*Id.* at p. 95.) After the mortgagor

defaulted, a decree of foreclosure was entered ordering the property's sale and declaring the mortgagor's indebtedness. "No provision was made in the decree for any deficiency which might remain after sale." (*Ibid.*) Over a year after the property was sold, the court ordered the foreclosure decree amended to provide for the mortgagor's personal liability. (*Id.* at p. 96.)

The Supreme Court identified several problems with this modification. A clerical error in a judgment may be corrected at any time, but not a judicial error. (*Id.* at pp. 97–98.) "In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill." (*Id.* at p. 98.) As the original complaint did not request a deficiency judgment, the foreclosure decree after default could not include one. In addition, the plaintiff had "failed to make a case entitling her" to a decree of the mortgagor's personal liability. (*Ibid.*)

Our case is the converse of *Scamman*. In that case, the modified decree granted a deficiency judgment not requested in the original complaint. Here, neither the 2009 decree nor the 2012 decree awarded the deficiency judgment which had been requested in the complaint. The modified decree expressly denied it. We do not understand either decree to have given Creditor greater relief or a different type of relief than requested in his complaint. Both decrees prevent Creditor from obtaining a deficiency judgment.

If anything, the omission to award a deficiency judgment in the 2009 decree and the express preclusion of a deficiency judgment in the 2012 decree gave Creditor lesser relief than he requested. Had the foreclosure decree fulfilled the complaint's requests to order sale of the property and to allow a deficiency judgment against Debtors, Creditor would have been able to pursue Debtors' personal liability if the proceeds of the sale did not fully repay the outstanding loan. A creditor who is denied a deficiency judgment must look entirely to the property to satisfy the secured indebtedness.

Debtors characterize the relief obtained as inconsistent with the relief requested because their right of redemption depends on the foreclosure decree providing for a

deficiency judgment against them. However, a debtor's right of redemption is not a creditor's remedy. Whether or not the judgment debtor redeems the property after a foreclosure sale, the creditor's financial recovery from the sale will remain the same. We do not understand the lack of a deficiency judgment in a judicial foreclosure action as giving Creditor a different type of relief. A creditor's aim in a judicial foreclosure action is presumably to obtain repayment of all secured amounts due. The unavailability of a deficiency judgment eliminates a potential source of the creditor's recovery, but does not alter the financial nature of the relief obtained.

Debtors contend they were "never notified in the Complaint that they stood to lose their post-sale redemption rights and never did they waive those rights." There are at least two reasons why the complaint's prayer for a deficiency judgment was no guarantee that Debtors would be subjected to a deficiency judgment if they defaulted. First, as Creditor points out, under section 726, subdivision (b) a judgment creditor may waive a deficiency judgment up until the time a foreclosure decree is entered. Second, Debtors could not be certain Creditor would prove his entitlement to a deficiency judgment at a prove-up hearing. The nature of the relief sought in the complaint, namely a calculation of the secured debt, an order of sale, and a determination of the availability of a deficiency judgment, was such as to require the court and not the clerk to enter a default judgment after hearing the plaintiff's evidence under section 585, subdivision (b). When entry of a default judgment calls for taking evidence or exercising discretion, it must be entered by the court and not the clerk. (*Lynch v. Bencini* (1941) 17 Cal.2d 521, 525–526; *Landwehr v. Gillette* (1917) 174 Cal. 654, 656–657; *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 287 (*Kim*).)

By their default, Debtors ran no risk that the default decree of foreclosure would exceed the demands of the complaint, but they did assume the risk that Creditor might either waive a deficiency judgment or simply fail to prove their personal liability for a deficiency judgment. (Cf. *Scamman*, *supra*, 118 Cal. at p. 98.) A defendant has no

legitimate objection under section 580, subdivision (a), if the court's default judgment, based on the evidence at the prove-up hearing, awards a lower amount of damages or lesser relief than requested in the complaint.

Because the prayer of the complaint requested a foreclosure decree providing for a deficiency judgment, it was within the court's jurisdiction to determine the availability of a deficiency judgment in a default decree. The 2009 decree failed to provide for a deficiency judgment, and the record provides no basis for inferring either that the trial court implicitly found that Creditor had waived his right to a deficiency judgment or that Creditor had failed to prove entitlement to a deficiency judgment. Instead, the original decree simply omitted a required finding. [5]

As the trial court in this case was authorized by the prayer of the complaint to determine that a deficiency judgment was either available or unavailable, a judicial error in making this determination would not render the 2009 decree void on its face. *Salter v. Ulrich* (1943) 22 Cal.2d 263 (*Salter*) determined that noncompliance with a different requirement of section 726, the one form of action rule, did not render a default judgment void on its face. In that case the creditor obtained a default judgment on a promissory note without mentioning in the complaint that the note was secured by a deed of trust. (*Id.* at p. 265.) The court reasoned that the one form of action requirement was "not necessarily a bar to an action on the note" because "its benefits may be waived by a failure to call the attention of the court to the true situation. Since this is a default

[5] Based on language in the 2009 decree describing the lapse over time of Debtors' equity of redemption, Creditor asserts that the decree recognized his "right to collect a deficiency." But section 726, subdivision (b) requires a court to determine the availability of a deficiency judgment, and the debtor's right to redeem flows from that determination. The statute does not provide that a creditor's entitlement to a deficiency judgment flows from a court's recognition of a right of redemption. As the decree did not provide for a deficiency judgment, its mention of redemption was surplusage.

judgment, and the attention of the court was not directed to the fact of security, the judgment is not void and cannot be collaterally attacked." (*Id.* at p. 268.)

While *Salter* involved a different type of noncompliance with section 726, it supports our conclusion that the 2009 decree was not void for omitting an explicit determination of the availability of a deficiency judgment. Not every judicial error renders a judgment void on its face. This mistake was subject to correction within the time allowed for correcting a judgment based on a mistake or excusable neglect, but not after that time period expired.

D. EFFECT OF THIS APPEAL

We have concluded that the 2009 decree of foreclosure included an illegal rate of postjudgment interest and was therefore partially void on its face. It was not void, however, for omitting an express determination about the availability of a deficiency judgment. These determinations limit the authority of the trial court to modify the 2009 decree after the time for a motion to correct a judgment has elapsed. "Since the challenged judgment only partially exceeded the court's jurisdiction, the trial court could have modified the judgment to save that portion which was not void." (*Becker*, *supra*, 27 Cal.3d 489, 495.) "The trial court may modify its judgment by striking therefrom that portion that is void on the face of the judgment roll (see § 670, subd. (a) for the contents of the judgment roll in case of a default) on its own motion, at any time its attention, by any manner, is called to the error." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 503.)

In this case the trial court did not limit itself to either striking the void portion of the original decree or modifying that decree to save what was not void. Instead, the 2012 decree purported to completely replace the 2009 decree, expressly providing for no deficiency judgment and providing for no postjudgment interest. The award of an illegal postjudgment interest rate in the original decree did not authorize the trial court to completely do away with it. The 2012 second decree is partially void on its face because

the trial court was not authorized to add the deficiency judgment preclusion.[6]

We recognize that the only relief Debtors have obtained through this appeal is to have an illegal rate of interest stricken from the 2009 decree. Otherwise, their rights are governed by the provisions of that decree, which determined the amount of their liability and ordered a judicial foreclosure sale without providing for a deficiency judgment and therefore without creating a right to redeem from the foreclosure sale.

III. DISPOSITION

The order denying the motion to vacate the July 31, 2012 judgment is reversed. The trial court is ordered to set aside the July 31, 2012 decree of foreclosure and to issue an order striking from the March 9, 2009 decree of foreclosure the provision for postjudgment interest at the rate of 14 percent.

---

[6] In light of this conclusion, we need not consider Debtors' alternative argument. Relying on two cases that involved judicial foreclosures, *Vlahovich v. Cruz* (1989) 213 Cal.App.3d 317 (*Vlahovich*) and *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664 (*C.J.A. Corp.*), Debtors have argued that Creditor must be held to his election of remedies. *Vlahovich* applied the rule that a litigant who has obtained a judgment granting one remedy will be held to his choice of remedies. (*Vlahovich*, at pp. 322–323.) *C.J.A. Corp.* partly relied on *Vlahovich*. In each of those cases, a judgment creditor prevailed on the trial court to award different relief after the creditor had obtained a decree of foreclosure including a deficiency judgment. In both cases the appellate court reversed the modified judgments. (*Vlahovich*, at p. 323; *C.J.A. Corp.*, at pp. 671–673.) In *Vlahovich*, three years after entering a decree of foreclosure following a court trial, the court modified the decree to authorize a private trustee's sale instead of a judicial sale. (*Vlahovich,* at pp. 319–320.) In *C.J.A. Corp.*, a senior lien holder conducted a nonjudicial foreclosure sale before a judicial foreclosure sale was held. (C.J.A. Corp., at p. 667.) Fifteen months later, on application of the junior lienor the court converted a foreclosure decree into a money judgment. (*Id.* at pp. 667–668.) The critical factual distinction is that the creditors in both of those cases obtained foreclosure decrees providing for deficiency judgments, which were subsequently modified to eliminate the possibility of redemption. In this case the original foreclosure decree submitted by Creditor did not award him a deficiency judgment. It does not amount to a change in remedies to go from no express deficiency judgment to expressly no deficiency judgment.

_____

Grover, J.

WE CONCUR:

_____

Bamattre-Manoukian, Acting P.J.

_____

Márquez, J.